PETITION FOR WRIT OF CERTIORARI
AND APPENDIX

In the

Supreme Court of the United States

Spring Term, 1961

No. 5

Petition for Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

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In the

Supreme Court of the United States

Spring Term, 1961

No. ____

LEO PRYOR,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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To the Chief Justice of the United States Supreme Court or the Justice Duly Allotted to the Fourth Circuit:

Now comes the petitioner, Leo Pryor, and pursuant to the provisions of Rule 23 of the Supreme Court Rules, respectfully showeth the following:

First

That in a criminal action originating in the United States District Court for the Eastern District of North Carolina entitled United States of America vs. William Henry Bryant, Leo Pryor, et als., your petitioner was convicted of unlawfully and knowingly conspiring, in violation of Section 371 of Title 18, U. S. Code, to commit the offense of

transferring marihuana without proper written order in violation of Title 26, U. S. Code, Section 4742(a), and convicted of the substantive offense of unlawfully transferring 11.08 kilograms of marihuana other than in pursuance of a lawful order therefor in violation of Title 26, U. S. Code, Section 4742(a). From sentences imposed by the Trial Court, wherein petitioner received a sentence of five years in the first count and twelve years in the subsequent count, said sentences to run concurrently, he, in apt time, appealed to the United States Court of Appeals for the Fourth Circuit, assigning error. The matter came on to be heard before such Court of Appeals at the September 26, 1960, Term thereof and was heard before the Court on September 28, 1960. On November 2, 1960, opinion was filed by the United States Court of Appeals for the Fourth Circuit affirming the conviction and sentences. That copy of such opinion is appended hereto and made a part hereof.

Second

Jurisdiction of the Supreme Court of the United States is invoked from the judgment and opinion of the United States District Court of Appeals for the Fourth Circuit upon its opinion and entry of the judgment affirming the conviction and sentences of the United States District Court for the Eastern District of North Carolina on November 2, 1960, the original indictment having alleged violations of the Statute Law of the United States, as set forth in the preceding paragraph hereof, and having alleged the violations as occurring within the jurisdiction of the Eastern District of North Carolina. At the time of this petition no order respecting a rehearing has been filed. The statutory provisions believed to confer jurisdiction on the United States Supreme Court to review the

judgment or decree in question by writ of certiorari is Title 28, Section 1254, which provides "cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree". That under date of November 25, 1960, the Honorable Earl Warren, Chief Justice of the United States, issued order granting an extension of time within which to petition for certiorari "to and including January 2, 1961".

Third

There are two questions presented for review: (1) Did the Court err in admitting against your petitioner an alleged confession made in his absence by a co-defendant, William Henry Bryant, when, by its very language, its sole purpose was to incriminate your petitioner? The co-defendant, William Henry Bryant, had been arrested while having in his possession 11.08 kilograms of marihuana. There was evidence connecting him with two other sales of marihuana to the undercover agent. The witness, Greenfeld, told Bryant, "you were arrested about half hour ago in possession of about 25 pounds of marihuana. You were confronted with Agent Patch to whom you made two sales of bulk marihuana for a total of $700.00. We are particularly interested in your source of supply. From whom did you obtain the 25 pounds of marihuana which was seized from you this evening? Answer: I got it from Leo Pryor at his house in Garner just outside of Raleigh. I went to his house and picked up the sack which he turned over to me". The Government witness, Patch, testified that immediately after the statement he went to the home of your petitioner.

While the Court attempted to limit the affect of the statement to Bryant, it dealt not with Bryant's guilt as to any count in the indictment, but had as its sole purpose a successful attempt to connect your petitioner with the transaction, denying him the right of confrontation. (2) Did the Court err in refusing to grant motions for judgment of acquittal made by your petitioner when there was no evidence of his participation in the conspiracy until after the alleged conspiracy was concluded and no direct evidence that this petitioner transferred marihuana? There were three transfers of marihuana involved. The co-defendant, Bryant, made these transfers. Bryant was arrested with the approximately 11.08 kilograms of marihuana. After his arrest he made the statements connecting your petitioner with these transactions. Your petitioner was not present at the time. The Officers thereafter testified that they attempted to pay your petitioner in part for the marihuana which had been seized and that he actually took $500.00 of their money. There was nothing else to connect him directly with any transaction and the only circumstance shown was one of casual association. The opinions of the Circuit Courts are in conflict as to whether or not one may be linked with a conspiracy after its completion by arrest of a principal and seizure of the contraband.

Fourth

The first question presented involves the constitutional safeguard as set forth in the sixth amendment to the Constitution of the United States guaranteeing to petitioner the right "to be confronted with the witnesses against him". The second question presented involves the very language of Title 18, Section 371, U. S. Code, which provides that "if two or more persons conspire—and one or more of such

persons do any act to effect the object of the conspiracy—". This Court, together with the Circuit Courts, have held that a conspiracy ends at the moment of any conspirator's arrest since at that time the conspiracy has been thwarted. The opinion of the United States Court of Appeals for the Fourth Circuit is set forth in the appendix hereto, as is the judgment of such court.

Fifth

This criminal action was instituted through the Grand Jury for the United States District Court in the Eastern District of North Carolina. Your petitioner was charged with a conspiracy to unlawfully transfer marihuana and also with the substantive count of transferring marihuana. There were four counts in the indictment. Your petitioner was not named in the second count. Judgment of acquittal was allowed as to the third count. He was convicted on the two counts above referred to. Objections and motions were made in apt time.

On July 16, 1959, Richard M. Patch, a Federal Narcotic Agent, met the co-defendant, William Henry Bryant, in Raleigh. As a result of this meeting Patch purchased two pounds of marihuana at a price of $100.00 per pound from another co-defendant, William Treadwell. On August 6th five additional pounds were delivered to the agent by still another defendant, Bessie Lee Ward. Bryant was paid the sum of $500.00 for the second deal.

On August 18th Bryant, who had been under surveillance, was arrested with twenty-five pounds of marihuana. After his arrest he made statement to Officers Patch and Greenfeld that Leo Pryor, your petitioner, was his source of supply. Your petitioner was not present at the time the statement was made although the same was admitted as evi-

dence in the trial. Immediately following the statement the Officers went to the home of Pryor where one of them handed him $500.00, stating it was in part payment of approximately twenty-five pounds of marihuana, which prior thereto had been seized from Bryant. The Officers led your petitioner into the yard of his home where Agent Johnson seized the money from the hand of your petitioner. The only evidence linking your petitioner with the conspiracy came after the seizure of the contraband and the arrest of Bryant. There was no evidence that he ever transferred marihuana, except through the admissions of Bryant made in his absence.

Sixth

Federal jurisdiction was acquired in the first instance by reason of the Federal Statutes hereinabove referred to and the alleged locus of the crime in the Eastern District of North Carolina. The writ is prayed for upon the basis:

(a) That the effect of the admission or alleged confession by the co-defendant, Bryant, was such as to deny to this petitioner his right of confrontation. This is an important question of Federal law and its application in this case constituted such a departure by the lower Courts as to call for an exercise of the Supreme Court's power of supervision. Originally the defendants had been charged with a conspiracy to unlawfully acquire marihuana. At the outset of the trial the District Attorney elected not to proceed on this charge, but to proceed only on the charges relating to an unlawful transfer. The alleged confession of the co-defendant, Bryant, therefore related not to any charge against him, but solely to the participation of your petitioner in his Bryant's, unlawful activity.

(b) The decisions of the United States Supreme Court and of the Circuit Courts are in conflict with the rulings of the Trial Judge and the decisions of the Circuit Court of Appeals in this case in that it has heretofore been held that a conspiracy ends at the moment of any conspirator's arrest since at that moment the conspiracy has been thwarted and presumably no other overt act contributing to the conspiracy can take place. *Sandez v. United States*, 239 Fed. 2d 239. Further, it was held in *Bollenbach v. United States*, 326 U. S. 607, 90 L. Ed. 350, 66 Sup. Ct. 402, that a defendant could not be convicted of having conspired to transport stolen securities across state lines merely on proof that he helped to dispose of the stolen securities after the interstate shipment was concluded. Further, from *U. S. v. Ehrgott*, 182 Fed. 267, it was held that the overt act essential to conviction for conspiracy could not succeed the completion of the contemplated crime. These indictments charged and the evidence pointed to a transfer to Agent Richard M. Patch. The transfer was complete prior to the conversation between Agent Patch and your petitioner.

(c) There was no evidence to support a finding under the fourth count that your petitioner was guilty of the substantive count of unlawfully transferring 11.08 kilograms of marihuana. His conviction on this count constituted a serious departure from the accepted and usual course of judicial proceedings. In fact, there was no transfer of marihuana with or without written order after attempt was made to pay your petitioner in part for that which had been seized from Bryant. Your petitioner was not charged with fraudulently accepting money for that which he was unable to deliver, but with the actual transfer. It is more than passingly strange that Court or jury could attach credence to the situation described by Patch. All dealings had been between

Patch and Bryant. There had been no introduction of Patch to your petitioner. Writing into the record something that does not appear in the evidence Patch could have known your petitioner only through Bryant and your petitioner could have known Patch only indirectly. Certainly Patch was not going to pay your petitioner for that which was to have been delivered him in Raleigh by the co-defendant, Bryant. If it related to a future delivery of other contraband, then such a crime is not supported by the fourth count in the indictment. Our basic system of jurisprudence provides for conviction only of a crime supported by valid indictment, otherwise defendants would not be advised as to the nature of the offense and could never avail themselves of a plea of former jeopardy.

Respectfully submitted,

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Counsel for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8102

BESSIE LEE WARD,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

No. 8104

LEO PRYOR,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

No. 8107

THOMAS JOHNSON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeals from the United States District Court for the Eastern District of North Carolina, at Raleigh
Algernon L. Butler, District Judge

Argued September 28, 1960 Decided November 2, 1960

Before SOBELOFF, Chief Judge, and SOPER and HAYNSWORTH, Circuit Judges.

Samuel S. Mitchell (Romallus O. Murphy and Richard Ball on brief) for Appellant in No. 8102; R. M. Holland and James R. Nance (Mitchell Gadsden on brief) for Appellant in No. 8104, and Irvin B. Tucker, Jr., Assistant United States Attorney, and Julian T. Gaskill, United States Attorney, for Appellee.

Opinion

HAYNSWORTH, Circuit Judge:

Three of several persons convicted as co-conspirators have appealed from their conviction, but only two of them have appeared in this Court. The third has done nothing to indicate the ground of his appeal.

The principal question raised by one of the appellants is the sufficiency of the evidence, while the principal question raised by the other who appeared in this Court, is the admission of a written confession of a co-conspirator made while in custody after the conspiracy as to the declarant had terminated.

We think the convictions must be affirmed.

William Henry Bryant, Leo Pryor, Thomas Johnson, William Treadwell, and Bessie Lee Ward were jointly in

dicted for conspiring to transfer marihuana without the requisite written order in violation of the statute.[1] In addition, there were counts for the substantive offenses of specific transfers of marihuana. All of the defendants were convicted on the conspiracy count. Bessie Lee Ward, one of the appellants, was also convicted on one of the substantive counts which charged that she, Bryant and Pryor unlawfully transferred 2.1936 kilograms of marihuana on August 6, 1959. Leo Pryor, the other appellant who appeared in this Court, was also convicted upon a substantive count which charged that he and Bryant effected an unlawful transfer of 11.08 kilograms of marihuana on August 19, 1959. Thomas Johnson, the nonappearing appellant, was also convicted under a substantive count under which he, Bryant and Treadwell were charged with having effected an unlawful transfer of 490.9 grams of marihuana on July 23, 1959.

The prosecution offered evidence that a federal narcotics agent, Patch, arranged through Bryant for the purchase of two pounds of marihuana, the transfer of which was effected on July 23, 1959. Bryant sent Patch to Johnson, who, thereupon, spoke to someone else, reporting back to Patch that everything was arranged, and, thereafter, Treadwell delivered the marihuana to Patch.

On August 6, 1959, Patch again arranged with Bryant for the purchase of marihuana. Bryant was observed thereafter to leave the club which he ran in Raleigh, North Carolina, and drive to the home of Leo Pryor, from which he returned to report to Patch that the necessary arrangements had been made, and that the marihuana would be ready for delivery that night. In the early evening of August 6, 1959, Bessie Lee Ward was seen driving her car.

[1] 26 USCA Sec. 4742.

with Bryant as her passenger, into Pryor's yard and from there to Bryant's club. Upon arrival there Bryant entered the club, told Patch that he had the marihuana which would be delivered to him by the girl in the car out front. Patch then approached the automobile, asked Ward if she had the "stuff", and she by motion of her head indicated that it was on the rear seat of the car. Patch then saw a burlap sack on the rear seat. Bryant came out of the club, however, and again entered Ward's car, which Ward drove several blocks away, where, preceding by Patch in his car, the delivery of the five pounds of marihuana was effected. Later Patch returned to the club to settle with Bryant for the purchase price of the marihuana at the rate of $100 per pound. Ward was with Bryant in a booth in the club and was present when Patch and Bryant settled their financial account and discussed arrangements for future purchases of marihuana.

Subsequently, arrangements were made by Patch to purchase twenty-five pounds of marihuana at a cost of $2500, which was to be effected on the night of August 18-19. At about 9:00 o'clock that night Bryant told Patch that he had obtained the "stuff", but had to go get it. He left the club and was observed driving a Cadillac into Pryor's yard, where he left his car and approached Pryor's house. Presently two men approached the car from the house with a bag, which was placed in the car, and one re-entered the automobile and proceeded to drive back towards Raleigh and Bryant's club. The car was stopped en route, Bryant was arrested, and the bag containing the marihuana was seized.

Shortly after his arrest, Bryant was questioned by Patch and others. Bryant readily admitted his participation in the transaction, and said that Leo Pryor was the source of his marihuana. He signed a written statement that evening, which, among other things, disclosed the fact that Pryor was the source of his supply.

After his talk with Bryant, Patch went to Pryor's house, told Pryor's wife who answered the door that he wished to speak to "Myatt", a fictitious name which Patch had been told was used by Pryor, whereupon Pryor was called and Patch was admitted to the house. Patch told Pryor that he had been sent by Bryant to settle with Pryor for the purchase price of the marihuana. Pryor said he was due $1800. The two then discussed future purchases of marihuana, Patch asking if he could not buy directly from Pryor without going through Bryant and the others. Pryor refused to sell future lots to Patch at the rate at which he sold to Bryant, but otherwise the matter of future purchases was left unsettled. Patch then delivered $500 to Pryor and said they would have to go out to the automobile to get the rest of the money. Other agents were concealed in the automobile, and they arose as the two approached arresting Pryor who still had the $500 in marked bills in his hand.

It is readily apparent from the foregoing recital that the evidence was more than sufficient to sustain the conviction of Pryor, Ward and Johnson, all of whom actively participated in supplying and transferring marihuana. Ward, who alone really raises the question, was not only seen to have driven her car into Pryor's yard with Bryant as her passenger and to return to Bryant's club, but she waited in the car with the marihuana, and, according to Bryant's declaration to Patch, the initial plan was that she, alone, was to effect the delivery. When she was asked by Patch if she had the "stuff", she indicated by a nod of her head where it was, and she later drove her car with Bryant as her passenger to the place where the transfer was effected. If there were any doubt of her knowledge of what she was doing, her participation in the conspiracy is made clear by her continuing presence as Patch and Bryant discussed arrangements for future sales of marihuana. There was no direct testimony

which would indicate that Ward did not know the nature of the contents of the package, when she assisted in its transfer, nor is there any other explanation consistent with innocence of her participation in the transaction and her presence as future transactions were discussed.

We think the evidence was sufficient to support the jury's findings of Ward's guilt.

Though Bryant, on the night of his arrest, appeared freely to discuss and admit his guilt, he entered a plea of not guilty, was actively represented by counsel at the trial and went to the jury on the plea of not guilty. It was thus not inappropriate that the prosecution, having a written confession from him, offered the confession as evidence of his guilt.

When the confession was offered and again in the charge, the District Judge, with meticulous care, explained that the jury could consider the written confession only in connection with the charge against Bryant, and that they should give no thought to that confession when considering the innocence or guilt of any other co-defendant, all of whom were jointly on trial. Counsel for Pryor objected to the admission of the confession, but did not suggest the deletion of Pryor's name, or any other procedure which would give protection to Pryor in addition to the Court's instructions. Neither did Pryor complain then or now of the adequacy of the Court's admonition against the jurors' consideration of the Bryant confession in connection with the charges against any of the other defendants. Pryor's position on appeal, therefore, is that the admission of the Bryant confession was necessarily so prejudicial to Pryor's rights that despite the Court's admonition, Pryor is entitled to a new trial.

It has long been settled that the extra-judicial declarations of a conspirator made in furtherance of the conspiracy are admissible against his co-conspirators, as Bryant's declaration that Ward would effect delivery of the package

transferred on August 6, 1959. But extra-judicial declarations made not in furtherance of the conspiracy, while admissible against the declarant, are not admissible against another who was not present when the declaration was made.[2] The recurring problem arises when defendants are jointly tried and when there is offered in evidence a declaration by one that is inadmissible against another co-defendant.

The Supreme Court has consistently held that with certain precautionary safeguards such declarations may be received when restricted by the Court's instructions to consideration in connection with the declarant's case only.[3]

It may be that in a particular case, admission of such a declaration should be otherwise restricted. It has been suggested, though it was not done in the trial of this case, that the names of defendants other than that of the declarant be blacked out from the written declaration.[4] In the normal case, such a precaution should be taken routinely. Perhaps in a particular case the evidence of guilt of a particular defendant might be so tenuous and the effect of a declaration of a co-defendant so devastating that the two defendants should not be tried together, but we have nothing of that sort of situation here. There was direct and persuasive evidence of Pryor's active participation. He, alone among the defendants, testified in his own behalf. He denied any connection with the marihuana. He testified that Patch, indeed, had called at his house on the night of August 18-19, 1959, and had thrust $500 upon him, but he said that he denied

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[2] Krulewitch v. United States, 336 U. S. 440, 69 S. Ct. 716, 93 L. Ed. 790.

[3] Delli Paoli v. United States, 352 U. S. 232, 77 S. Ct. 294; 1 L. Ed. 2d 278; Lutwak v. United States, 344 U. S. 604, 73 S. Ct. 481, 97 L. Ed. 67; Blumenthal v. United States, 332 U. S. 539, 68 S. Ct. 248, 92 L. Ed. 154; Ball v. United States, 163 U. S. 662, 16 S. Ct. 1192, 41 L. Ed. 300.

[4] See United States v. Paoli, 2 Cir., 229 F. 2d 319.

that Bryant, or anyone else, owed him any money, and that he had declined to accept the money. He testified that the money was again placed in his hand as they approached the car shortly before his arrest.

Whatever may be thought of the relative reasonableness of the two versions of the events at Pryor's house on August 18-19, 1959, Pryor was entitled to have the jury consider the two versions without regard to Bryant's confession. The jury was adequately and properly instructed to that effect. The risk that the jury would not strictly follow its instructions is no greater here than it is in any case in which the extra-judicial declaration of a co-conspirator is received in evidence when it is not admissible against another co-defendant on trial.

Indeed, it is not so much the Bryant confession, itself, which was hurtful to Pryor, for, as to him, the jury would have understood the Bryant declaration, though the confession had never been offered. If Patch on the witness stand had testified to his acts in sequence, he would have informed the jury that he talked with Bryant after his arrest, and that Bryant told him the source of supply, a fact which Patch already had reason of suspect from observations of the other agents and which was already suggested by the testimony. Without indicating to the jury the identity of the source, as disclosed by Bryant, if Patch had then said that he immediately proceeded to Pryor's house where he stated that he had been sent by Bryant and was told by Pryor that he was due $1800 for the twenty-five pounds of marihuana, no member of the jury would have been left in ignorance of the Bryant disclosure. It was the sequence of events and the Patch version of the conversation with Pryor at Pryor's house that evening which was damning to Pryor. The written Bryant statement made it hardly more so.

Nothing could have been gained, therefore, by a sever-

ance of the trial, or, without severance, an exclusion of the Bryant confession. In either instance, the jury trying Pryor would have quickly understood what Bryant told Patch from Patch's testimony of his subsequent action and his version of his conversation with Pryor. Under these circumstances we think the harm to Pryor from the receipt in evidence of the Bryant admission was minimal. The possibility of some prejudice is present in every such case, but here it seems much less substantial than in most of those cases in which the admission of a declaration by one defendant, inadmissible against a co-defendant being jointly tried, has been approved.

Rule 14 of the Federal Rules of Criminal Procedure provides:

> "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

Whenever it appears to the court that there is a likelihood of injustice to any defendant or to the Government, the court may exercise its discretion to order an election or grant a severance, as permitted by the rule. We recently discussed this general subject in Ingram v. United States, 272 F. 2d 567. The application for such an order should not be granted automatically or refused automatically, but the trial judge should be guided in his decision by the circumstances.[5] The danger of prejudice may sometimes be adequately avoided if the objectionable portions of the documentary evidence

[5] See, e.g., Judge Chesnut's opinion in United States v. Decker, 51 F. Suppl. 20.

are obliterated before the documents are received in evidence, but no rule can be laid down encompassing every possible situation. It is in the judicial discretion. Here, however, Pryor, represented by counsel of his choice, did not move for a severance and did not suggest obliteration of the objectionable matter from the Bryant confession. Nevertheless, in the interest of justice, we have considered the matter and find no error because the unedited Bryant confession added little, if anything, to the force of the sequence of events and the conversation with Pryor as related by the agent on the witness stand.

AFFIRMED.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 8104

LEO PRYOR,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina

Judgment

This cause came on to be heard on the record from the United States District Court for the Eastern District of North Carolina, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

Simon E. Sobeloff
Chief Judge, Fourth Circuit

Morris A. Soper
United States Circuit Judge

Clement F. Haynsworth, Jr.
United States Circuit Judge

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 8104

LEO PRYOR,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh

Stay of Execution

Upon the application of the appellant, by his counsel, and for good cause shown,

It is ordered that the mandate of this Court in the above entitled case be, and it is hereby, stayed pending the application of the appellant in the Supreme Court of the United States for a writ of certiorari to this Court, provided the application for a writ of certiorari is filed in the Supreme Court within the time provided by law.

November 14, 1960.

Simon E. Sobeloff
Chief Judge, Fourth Circuit

SUPREME COURT OF THE UNITED STATES
October Term, 1960

No. .....

LEO PRYOR,
Petitioner,

v.

UNITED STATES

Order Extending Time to File Petition for Writ of Certiorari

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 2, 1961.

(s) Earl Warren
Chief Justice of the United States

Dated this 25th
day of November, 1960.

No. 625

In the Supreme Court of the United States

OCTOBER TERM, 1960

LEO PRYOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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WILLIAM E. FOLEY,
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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 625

LEO PRYOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 49-58; Pet. App. 1-10) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1960 (R. 59; Pet. App. 11). On November 25, 1960, Mr. Chief Justice Warren extended the time for filing a petition for a writ of certiorari to and including January 2, 1961, and the petition was filed on January 3, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court committed reversible error in admitting into evidence a post-arrest confession of a co-conspirator, even though the court repeatedly admonished the jury to consider the confession only as to the declarant, and not as to any other defendant.

2. Whether the evidence supports the conviction.

STATEMENT

Following a jury trial held in the United States District Court for the Eastern District of North Carolina, petitioner, together with four others,[1] was convicted of conspiring to transfer marihuana not pursuant to a written order form in violation of 26 U.S.C. 4742(a) (count 1) and of a substantive violation of that statute (count 4).[2] Petitioner was sentenced as a second offender to four years' imprisonment on count 1, that sentence to run concurrently with a twelve-year sentence imposed on count 4 (R. 46).

1. On July 16, 1959, narcotic agent Richard M. Patch, acting in an undercover capacity, contacted defendant Bryant at the Press Club, in Raleigh, North Carolina, and informed him that he wanted to

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[1] William Henry Bryant, Thomas Johnson, William Treadwell, and Bessie Lee Ward.

[2] The indictment contained four counts. Petitioner was not named in count two. He was named in count three, but the charge against him on this count was dismissed at the close of the government's case. (R. 16).

purchase five pounds of marihuana. Bryant told him he knew of a "man" nearby growing marihuana crops, but did not know if he would be willing to sell such a small amount. After agreeing on the price ($100 per pound) and after some further discussion as to the amount, Bryant said he would discuss it with "the man" (R. 3-5). On July 23, Bryant told the agent, "I have got you the connection and he has the stuff" (R. 5). The agent then went to a cafe owned by defendant Johnson. Johnson went to an adjacent house from which defendant Treadwell emerged and placed two pounds of marihuana in the agent's car. The agent then gave him $200 of government funds (R. 5-7). No written order form was given to Treadwell for the marihuana (R. 9-10).

On August 6, 1959, Agent Patch returned to the Press Club and talked with Bryant concerning another purchase of narcotics. Defendant Johnson was present at this time. Bryant said that he had not seen "the man" yet but would go see him (R. 11). Bryant then left and returned at about 1 p.m. and told the agent that he had seen "the man" and that the "stuff" would be ready at about 9 p.m. that night (R. 12). Delivery of five pounds of marihuana was made at about 9:20 p.m. that evening by defendants Ward and Bryant (R. 12-14). The agent paid Bryant $500 and Bryant gave him his telephone number for future calls (R. 14-16). No written order form was given to any of the defendants at the time of this transaction.

Agent Johnson, who had Bryant under surveillance on August 6, testified that, shortly after noon, Bryant

left the Press Club and proceeded to petitioner's farm some 6 miles from Raleigh (R. 21-22). The agent observed petitioner and Bryant in conversation for 6 or 7 minutes and then saw them enter the house. Shortly thereafter, Bryant left and drove back to the Press Club (R. 22). Agent Johnson further testified that about 8:30 p.m. that evening he observed a 1958 Chevrolet, license No. DT 350, driven by defendant Ward coming from the vicinity of petitioner's premises and proceeding to the Press Club (R. 22-23). Agent Melvin testified that, on the same night, he observed the Chevrolet enter petitioner's premises, that there were a man and woman in it, and that he thereafter followed the car back to Raleigh (R. 31-32).

On August 17, 1959, Agent Patch again contacted Bryant and arranged to purchase 25 pounds of marihuana. The next evening at about 9 p.m., they met at the Press Club (R. 16-17). Bryant told the agent that he had the stuff available, but refused to allow the agent to accompany him to obtain it (R. 17). When Bryant left to get the marihuana, Agent Patch arranged for his surveillance (R. 17). Bryant thereupon drove to petitioner's farm, entered the premises and returned shortly thereafter with a bag which he placed in the back seat of his automobile. Soon after, on his way back to Raleigh, his automobile was stopped and he was arrested. In the back seat of his car was found a bag containing about 25 pounds of marihuana (R. 24-25, 28-29, 32-34, 34-36).

Shortly after midnight, Agent Patch, accompanied by other enforcement officers, went to petitioner's

home. The agent identified himself as "Dick," [3] and stated that Bryant had told him to pay petitioner his share for the "pot" (marihuana) transferred that night (R. 18-19). Petitioner agreed and said the price was $1800. The agent then discussed the possibility of cutting Bryant out of future arrangements altogether. Petitioner said he would have to think about it. When the agent asked if petitioner could get him 50 pounds of marihuana, petitioner replied that he could have it for him the next morning, and said that he would consider the possibility of reducing the price to $75 a pound. The agent then paid petitioner $500 in government funds, and told him that he had the remainder owing for the transaction in his automobile. Petitioner accompanied the agent outside holding the $500. Just before they reached the automobile, the agent identified himself and placed petitioner under arrest (R. 19-20; see also the testimony of Agent Johnson, R. 25-27).

2. After Bryant's arrest, on the night of August 18, he told Agent Patch, that he had obtained the marihuana from petitioner (R. 18). This testimony was offered by the prosecutor only against Bryant; and the trial judge immediately admonished the jury that the conversation had with Bryant after his arrest "will be considered by you only as it relates to the defendant William Henry Bryant and will not be considered by you in relation to any other defendant in the case" (R. 18). Immediately after

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[3] At his original meeting with Bryant on July 16, Agent Patch had introduced himself as "Dick McAfee, from Baltimore" (R. 4).

this precautionary instruction, Agent Patch testified to further aspects of his conversation with Bryant on this occasion. The trial judge overruled defense counsel's motion to strike and again cautioned the jury that it could consider this evidence only as to defendant Bryant and not "against the defendant, Pryor, or any other defendant" (R. 18).

Subsequently, federal narcotic agent Irvin Greenfeld read to the jury the signed statement given by Bryant after his arrest on August 19 (R. 36-38). Immediately before and after the statement was read, the court made clear that it could only be considered by the jury as it related to defendant Bryant, stating, in part, that "[i]f a defendant, after his arrest, implicates other defendants in any statement or admissions which he may make it is not evidence against the co-defendants because as to those defendants it is merely hearsay evidence and is incompetent. So I again caution you that you will consider this statement just read to you only as it relates to the defendant William Henry Bryant and you will not consider it as evidence in any relation to any other defendant" (R. 38-39). Thereafter, in his charge to the jury, the trial judge stated (R. 40-41):

> During the course of the trial, the Government's witness Irvin I. Greenfeld, District Supervisor of the Federal Bureau of Narcotics, read to you an alleged statement of the defendant William Henry Bryant made after his arrest on or about August 18, 1959. This statement was admitted only as it relates to the defendant Bryant and the statement will be considered by you solely in connection with your determination

> of the guilt or innocence of the defendant Bryant. It is not to be considered as evidence in connection with your consideration of the guilt or inocence of any of the other defendants.
> * * *

There was no objection by counsel to the charge as given.

ARGUMENT

1. Petitioner claims that the admission into evidence of the Bryant confession, obtained from Bryant after his arrest and his part in the conspiracy had terminated, was fatally prejudicial. This contention, however, is fully controlled by this Court's decision in *Delli Paoli* v. *United States*, 352 U.S. 232, which rejected the very same contention raised by petitioner here. See also *Blumenthal* v. *United States*, 332 U.S. 539, 551-553, 559-560. As in *Delli Paoli*, the jury here was repeatedly instructed each time any reference was made during trial to the post-arrest confession of Bryant that it consider his statements only on his case and not as to "Pryor, or any other defendant" (R. 18; see R. 38-39). In addition, in his charge to the jury the trial judge plainly restricted the Bryant confession to the issue of Bryant's guilt or innocence stating once again that the jury could not consider it as to any of the other defendants (see the Statement, *supra*, pp. 6-7; R. 39-41). Petitioner never moved for a severance (though represented by counsel of his choice), never requested that the confession be edited to delete any reference to him, and never raised any objection to the trial court's charge.

This was not a case of a complex conspiratorial scheme involving a mass of evidence hard to segregate. Rather, the conspiracy proved was simple in character and scope, and easily understandable by the jury. Furthermore, particularly on the substantive charge of which petitioner was also convicted—transferring marihuana without receipt of an order form on August 19, 1959—the evidence was conclusive of petitioner's guilt, totally apart from the Bryant confession (see the Statement, *supra*, pp. 4-5).[4] What this Court said in *Delli Paoli* is equally applicable here (352 U.S. at 242):

> Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense. * * *

Similarly, there is nothing in this case to suggest that the repeated admonitions of the trial judge were not heeded by the jury, and that it convicted petitioner on anything but evidence properly admissible as to him.

2. Petitioner's argument as to the sufficiency of the evidence (Pet. 4, 7-8) was reviewed and rejected by the court below (Pet. App. 7-9). The evidence summarized in the Statement, *supra*, reveals that the evidence was sufficient to convict petitioner on both the

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[4] Since petitioner was sentenced to twelve years on this substantive charge to run concurrently with the four years imposed on the conspiracy count, the former conviction is sufficient to support the judgment.

conspiracy and substantive counts, wholly apart from the Bryant confession. There is no reason for further review of this factual question by this Court.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari be denied.

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